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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

SAM PATTERSON,

Defendant and Appellant.

2d Crim. No. B229275
(Super. Ct. No. BA355353)
(Los Angeles County)

Sam Patterson appeals a judgment following his conviction of two counts of second degree robbery (Pen. Code, § 211),¹ one count of misdemeanor brandishing a replica gun (§ 417.4), and one count of forced oral copulation (§ 288a, subd. (c)(2)(A)). The charges arose from his encounters with two women on the streets of Los Angeles on two consecutive mornings. The jury found Patterson not guilty of kidnapping to commit rape or robbery. (§ 209, subd. (b)(1)). The trial court sentenced Patterson to 12 years in state prison, and ordered lifetime registration as a sex offender pursuant to section 290.

We conclude that 1) the court did not err when it denied Patterson's motion for mistrial based on late disclosure of a police report (*Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*)); 2) the court did not err when it instructed on flight; and 3) the abstract of judgment and the court's minutes must be corrected to accurately reflect that

¹ All statutory references are to the Penal Code.

the court imposed a six, not eight, month term for the brandishing conviction. We direct the trial court to correct its minutes and to correct the abstract of judgment. In all other respects, we affirm.

Patterson filed a petition for writ of habeas corpus. We deny it by separate order.

FACTS AND PROCEDURAL BACKGROUND

Crimes Against R.B.

R.B. testified that on the morning of January 12, 2008, she was working as a prostitute on Figueroa Street in downtown Los Angeles. She carried a purse with cigarettes, a cell phone, makeup, and condoms.

A man drove up and asked R.B. how much she would charge to orally copulate him. They agreed to a price of \$50, and she got into his car. She wanted to park under a nearby bridge, but a police car was there, so they drove past the police car and parked on the next street.

The man gave R.B. cash, which she put in her bra. She put a condom on his penis, and orally copulated him. He was "taking awhile," so she told him he must give her more money or she would leave. The encounter had been consensual until this point.

The man took a gun from behind the seat, held it to R.B.'s head, and told her to continue orally copulating him, which she did. (§ 288a, subd. (c)(2).) After he ejaculated, he took the money from her bra and took her cigarettes and cell phone from her purse. (§ 211.) He told her to get out of the car.

R.B. walked back to the police car for help. She told the officers what had happened. She described the man as black, five feet nine inches tall, weighing about 215 pounds, with his hair in braids. She described his car as a two-door white Pontiac Grand Prix with tan leather seats and California plates. Officer Jeremy Duncan said, "I[ve] just seen that car pass me."

Later that morning, Officer Duncan showed R.B. a line-up of six photographs. Patterson's photograph was not included. R.B. marked photograph No. 2

with her initials, and told Officer Duncan, "Number two looks close, but he is too small. The guy was bigger." Officer Duncan recorded her comments.

About a month after the first photo lineup, R.B. met with police detectives who showed her another set of photographs. Patterson's photograph was included in this set as No. 6. R.B. wrote, "Person number 6 put a gun on me and took my money, my cell phone and made me suck his dick. He took \$50 from me." She also identified Patterson at the preliminary hearing and at trial.

One day after R.B.'s attack, Patterson was arrested nearby in a two-door white Pontiac Grand Prix with gray cloth seats and California plates. At the preliminary hearing, R.B. said the car had four doors. At trial, she identified the car in which Patterson was arrested. There were some other discrepancies in her testimony. For example, she testified at the preliminary hearing that she was working with a pimp on the day of the encounter, but said at trial that she was not. There was a two-hour disparity between the time she said the incident occurred and the time police said she approached them.

After R.B.'s trial testimony, the prosecutor announced that she had just received a report from Officer Duncan that had not been previously disclosed. In it, Officer Duncan reports that he checked the registration of a two-door white Pontiac Grand Prix that drove by shortly before R.B. approached his patrol car. Duncan saw the driver, who was black and had his hair in braids. The car was registered to Odis Patterson. Duncan included the uncle's photograph in the initial line up as photograph No. 2. Odis Patterson is Sam Patterson's uncle and physically resembles him, although the uncle is smaller.²

Defense counsel asked the court to exclude the new evidence and he requested a mistrial. He argued that the report was exculpatory, because it pointed to another perpetrator. He also argued that the report would destroy his credibility with the jury, because he had suggested in his opening statement and cross-examination of R.B.

² The jury did not learn this fact.

that she had identified the wrong customer, based on her identification of someone else in the initial line-up and her description of a four-door car with leather seats.

The trial court denied the request for a mistrial because Patterson did not consent. It found that the late disclosure "compromise[d] [the] defense" and that there was no bad faith on the part of the prosecutor. The prosecutor acknowledged that defense counsel would have approached the opening statement and cross-examination differently if the report had been disclosed earlier.

Over the ensuing weekend, defense counsel tried to locate Patterson's uncle without success. His investigator did speak to the uncle's mother. When trial resumed, the court announced that it had conducted research and learned that it could grant a mistrial over Patterson's objection if it found legal necessity, but that it found no legal necessity for mistrial because there was other compelling evidence against Patterson. Defense counsel argued that he needed more time to find the uncle and to investigate whether the uncle had a history of sexual offenses or any other similar looking nephews. He renewed his argument that the late disclosure had destroyed the credibility of the defense. Patterson personally withdrew his objection to mistrial. The court did not change its ruling.

The court gave a curative instruction concerning Officer Duncan's report. It explained that the prosecution "failed to timely disclose" the observations of Officer Duncan and his report "without lawful justification," and that the jury should consider that delay if it found the information related to a matter of importance not established by other credible evidence. In closing argument, defense counsel said that the observation of Officer Duncan caught him "a little bit on surprise," but he emphasized that he tried to be as accurate as he could with everything he presented.

Crimes Against Ruby B.

Ruby B. testified that on the morning of January 13, 2008, she was walking to a bus stop in downtown Los Angeles. She was not a prostitute. She wore a dress and heels because she had spent the night with a friend. She had a cell phone in her pocket.

A man (later identified as Patterson) drove up in a white Pontiac Grand Prix. He pointed a gun at her and told her to get in. (§ 417.4.) She had never seen him before. She got in. Patterson's pants were down and his penis was exposed. He pointed the gun at her and told her to orally copulate him.³ He took her cell phone. (§ 211.)

While the man pointed the gun to her head, a car drove up and parked facing them. Someone got out of the passenger side and started to approach. Ruby did not know the people in the car, but she thought they were going to help her. Patterson backed his car away, striking a parked truck, made a U-turn, and sped away with Ruby still in his car. The contents of the car flew around and Ruby found the gun in her seat. She pointed it at Patterson and told him to let her out of the car. He told her to shoot him. Instead, she threw the gun out the open driver's side window.

A sheriff's deputy testified that he and his partner were driving in the area when they saw the two-door white Pontiac Grand Prix run several stop signs, so they pursued it. When they caught up to it and turned on their lights, the car slowed. Ruby got out while it was still moving. She was screaming and looked scared. The car stopped and Patterson emerged with his pants down.

Ruby told the deputies that Patterson had taken her cell phone. The deputies found it in the center console. They also found crumpled money and a condom that held traces of Ruby's and Patterson's DNA, but not R.B.'s. Ruby showed them where she had thrown the gun out the window, and they found a pellet gun nearby. The deputies found the damaged truck. The encounter with Ruby started about one and one-half miles from the encounter with R.B. The trial court gave a flight instruction, over Patterson's objection, based on Patterson's driving.

³ Ruby said nothing about oral copulation in her initial interviews with police, and she specifically denied any physical contact in her preliminary hearing testimony. A year after the incident, a detective took a DNA sample from her, at which point she said she had been forced to orally copulate Patterson. The prosecutor did not charge oral copulation of Ruby.

After the verdict, the court granted Patterson's motion to represent himself. Patterson filed a motion for new trial which the court denied.

DISCUSSION

I.

The Motion for Mistrial

Patterson contends that he was entitled to a mistrial because Officer Duncan's report contained material and exculpatory information that would have changed the result of trial if it had been disclosed earlier. (*Brady, supra*, 373 U.S. at p. 87 [prosecution's suppression of evidence materially favorable to the defense denies defendant due process of law, regardless of good or bad faith].) The People argue that Patterson forfeited his *Brady* claim because he did not make it in the trial court. (*People v. Romero* (2008) 44 Cal.4th 386, 411 [constitutional claim forfeited by failure to raise it in the trial court].) The People also contend there was no *Brady* violation because the information was not exculpatory; because it was disclosed in time for its effective use at trial (*People v. Wright* (1985) 39 Cal.3d 576, 589 [*Brady* is not violated if disclosed in time for presentation to the jury]; and because Patterson only speculates that the result would be different if the report had been disclosed earlier. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1043, 1049-1050 [*Brady* does not require disclosure of information that "might" prove helpful to the defense].)

Patterson did not forfeit his *Brady* claim. His counsel preserved the claim when he argued that the report contained exculpatory information and that its late disclosure "impact[ed] Mr. Patterson's federal and state due process rights." The claim is, however, without merit.

We review an order denying a motion for mistrial under the deferential abuse of discretion standard. (*People v. Cox* (2003) 30 Cal.4th 916, 953, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) The elements of a *Brady* claim are subject to our independent review. (*People v. Salazar, supra*, 35 Cal.4th at p. 1042.) A trial court should only grant a mistrial if it is apprised of prejudice that it judges

incurable by admonition or instruction. (*Cox*, at p. 953.) The trial court has considerable discretion to determine whether or not an incident is incurably prejudicial. (*Ibid.*)⁴

Due process prohibits the prosecution from suppressing evidence that is materially favorable to the accused. (*Brady, supra*, 373 U.S. at p. 87; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132 [duty extends to material possessed by investigative agency], disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th 390, 421.) It is the defendant's burden to establish the elements of a *Brady* claim. (*People v. Hoyos* (2007) 41 Cal.4th 872, 918.) Evidence is not "suppressed" for purposes of a *Brady* claim if it is presented at trial, regardless of whether or not it has previously been disclosed during discovery. (*People v. Verdugo* (2010) 50 Cal.4th 279, 281; *People v. Morrison* (2004) 34 Cal.4th 698, 715.) Late discovery may warrant statutory sanctions, but Patterson disavows any statutory claim on appeal, relying wholly on *Brady*.

Evidence is "favorable" for purposes of *Brady* if it hurts the prosecution or helps the defense. (*People v. Morrison, supra*, 34 Cal.4th at p. 714.) Not all favorable evidence is material. (*People v. Salazar, supra*, 35 Cal.4th at pp. 1050-1051.) Evidence is "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. (*Id.* at p. 1042.) A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome. (*Id.* at p. 1050.)

There was no *Brady* violation here because any exculpatory information in Officer Duncan's report was disclosed in time for effective presentation to the jury. The report was favorable to the defense to the extent that it pointed to another possible perpetrator. But the jury learned this information early in the trial. Evidence that is presented at trial is not considered suppressed. (*People v. Verdugo, supra*, 50 Cal.4th at

⁴ After jeopardy attaches, a trial court may only grant a mistrial if either (1) the defendant consents to it, or (2) legal necessity requires it. (*Curry v. Superior Court* (1970) 2 Cal.3d 707, 717-718.) Here, Patterson eventually consented to mistrial and legal necessity was not required.

p. 281.) In *People v. Wright, supra*, 39 Cal.3d 576, for example, mistrial was properly denied where the prosecution disclosed materially favorable police reports after closing argument but before deliberations. The trial court explained the situation to the jury, and allowed the defendant to reopen his case to present the new impeachment evidence. Defense counsel argued that disclosure was untimely because if he recalled the prosecution's witness, she could reform her testimony based on the closing arguments she had heard. The court rejected the argument and concluded that the remedial measures employed were sufficient to ensure a fair trial. (*Id.* at pp. 590-591.) Here, the information was disclosed early in trial and Patterson had a fair opportunity to use it in his defense.

Patterson argues that Officer Duncan's report was not disclosed in time for effective use because he did not have time to investigate whether the uncle had a history of sexual offenses or whether another nephew might have resembled him. In determining materiality, we consider the effect of nondisclosure on defense investigations and trial strategies (*People v. Zambrano, supra*, 41 Cal.4th at p. 1132), but the defendant must establish that the result of the proceedings would be different with disclosure. (*People v. Hoyos, supra*, 41 Cal.4th at pp. 917-918.) The prosecution has no general duty to disclose all evidence that might have changed the outcome, "might [have been] beneficial," or "might [have] prove[d] helpful to the defense." (*People v. Salazar, supra*, 35 Cal.4th at pp. 1049-1050.) With or without the report, Patterson was in the same white two-door Pontiac Grand Prix the following day, in the same general area, under very similar circumstances. R.B. and Ruby identified Patterson at trial. R.B.'s identification of Patterson in the second set of photographs was unequivocal. Patterson has not affirmatively established that the result would be different if the report had been disclosed earlier. "[T]he constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." (*Kyles v. Whitley* (1995) 514 U.S. 436-437.)

If defense counsel's credibility was undermined by the report, it was because it held unfavorable evidence linking one car to both encounters. Delayed

disclosure of inculpatory information does not implicate *Brady*. The delayed disclosure of inculpatory information did violate the discovery statute, but Patterson does not pursue that claim on appeal. Wisely so, because the trial court acted within its discretion when it determined that any prejudice to the credibility of the defense would be remedied by the curative instruction. The court did not err by denying Patterson's motion for mistrial.

II.

Claimed Instructional Error

Patterson contends that giving CALJIC 2.52 without modification constituted error because his flight may have been motivated by fear rather than guilt. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055 [flight requires a purpose to avoid being observed or arrested].)

The trial court has a sua sponte duty to instruct on flight whenever the prosecution relies on evidence of flight to show consciousness of guilt. (*People v. Williams* (1960) 179 Cal.App.2d 487, 491.) The prosecution did so here, and the instruction is proper. Patterson did not request modification in the trial court, so has forfeited his claim that the instruction should have been modified to require a predicate finding that flight was for the purpose of avoiding observation or arrest. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) The instruction was supported by the evidence because the circumstances of Patterson's reckless driving permitted an inference that he drove with a purpose to avoid observation or apprehension by Ruby's would-be rescuers. (*People v. Turner* (1990) 50 Cal.3d 668, 694 [flight instruction is proper if evidence of the circumstances of defendant's departure from the crime scene supports an inference that his movement was motivated by guilty knowledge].) The circumstances could have supported a contrary inference that Patterson fled because he was afraid of the people in the other car, but the resolution of competing interpretations was a matter for the jury to resolve. The court properly instructed on flight.

III.

The Abstract of Judgment

The court imposed a six-month term for the brandishing count, as recorded in the reporter's transcript. The court's minutes and the abstract of judgment mistakenly reflect an eight-month prison term on that count. The reporter's transcript controls. (See *People v. Stephenson* (1974) 10 Cal.3d 652, 656.) The minutes and the abstract must be corrected.

DISPOSITION

The trial court is directed to correct the court's minutes and the abstract of judgment to reflect imposition of a six-month term for misdemeanor brandishing a replica gun. (§ 417.4). The trial court shall forward the corrected abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.*

PERREN, J.

* Retired Associate Justice of the Court of Appeal, Second Appellate district, assigned by the Chief Justice pursuant to article VI, section 6 of the California constitution

George G. Lomeli, Judge
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